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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MUNGER, TOLLES & OLSON LLP)	Case No. CV 13-06890 DDP (MANx)
O/B/O AMERICAN MANAGEMENT)	
SERVICES LL, D/B/A PINNACLE,)	ORDER RE: MOTIONS FOR SUMMARY
)	JUDGMENT
Plaintiff,)	
)	[DOCKET NUMBERS 27 AND 31]
v.)	
)	
UNITED STATES DEPARTMENT OF)	
THE ARMY,)	
)	
Defendant.)	
_____)	

Presently before the court are cross-motions for summary judgment regarding Plaintiff's request for documents from Defendant, a government agency, under the Freedom of Information Act ("FOIA"). Although Defendant has released some responsive documents, Plaintiff alleges that the documents released were improperly redacted, more documents should be released, and Defendant unreasonably delayed answering the request even with regard to the documents that were produced. Defendant argues that its search was reasonable and that the documents not released are exempt from disclosure.

1 **I. BACKGROUND**

2 Plaintiff Munger, Tolles & Olsen LLP ("MTO") brings this suit
3 as the requestor of certain records allegedly held by the
4 Department of the Army ("the Army"). (Compl. ¶ 13.) MTO requested
5 the records, and now sues, on behalf of its client, American
6 Management Services LLC d/b/a Pinnacle ("Pinnacle"). (Id. at ¶ 1,
7 9.) Pinnacle is involved in ongoing litigation with Clark Realty
8 Capital, LLC ("Clark") over a joint venture between the two
9 companies to develop and manage certain family housing complexes
10 for the Army (collectively, "the Projects"). (Id. at ¶¶ 5-7, 17-
11 21.) Pinnacle alleges that Clark is attempting to force it out of
12 the Projects. (Id. at ¶¶ 5-7, 22.) The requested records are
13 proposals to modify and expand the scope of the Projects, which
14 Pinnacle alleges resulted in "millions of additional dollars for
15 the projects—funds that became available at essentially the same
16 time that Clark initiated litigation against Pinnacle"
17 (Id. at ¶ 8.)

18 Thus, on September 17, 2012, MTO submitted a FOIA request to
19 the Army (via the Office of the Assistant Secretary of the Army,
20 Installations & Environment) requesting the release of the
21 following:

22 1. All documents and communications received from Monterey Bay
23 Military Housing LLC related to Modified Scope Plans at
24 Monterey Bay, including but not limited to preliminary
25 reports, presentations, projections, forecasts, working
26 papers, and assessments.

27 2. All documents and communications received from Fort Belvoir
28 Residential Communities LLC related to Modified Scope Plans at

1 Fort Belvoir, including but not limited to preliminary
2 reports, presentations, projections, forecasts, working
3 papers, and assessments.

4 3. All documents and communications received from Fort Benning
5 Family Communities LLC related to Modified Scope Plans at Fort
6 Benning, including but not limited to preliminary reports,
7 presentations, projections, forecasts, working papers, and
8 assessments.

9 4. All documents and communications received from California
10 Military Communities LLC or Fort Irwin Land LLC related to any
11 post-closing capital contributions to Fort Irwin Land and any
12 subsequent loans from Fort Irwin Land to California Military
13 Communities, including but not limited to preliminary reports,
14 presentations, projections, forecasts, working papers, and
15 assessments.

16 (Compl., Ex. A.)

17 Plaintiff alleges, and provides documentation of, the
18 following chain of events after its request was received: On
19 September 28, 2012, Paul Cramer of the Assistant Secretary's office
20 informed MTO that the United State Army Corps of Engineers, Norfolk
21 District ("USACE") handled FOIA requests regarding the projects.
22 (Compl., Ex. B.) On October 8, 2012, MTO directed its request to
23 the appropriate person at USACE. (Compl., Ex. C.) On October 17,
24 USACE notified MTO that because the request "involve[d] records
25 that were obtained from a non-government source," USACE would have
26 to hear legal arguments from the source (here, Clark) before
27 releasing the documents. (Compl., Ex. D.) On January 14, 2013,
28 the Army released "just one heavily redacted document" out of

1 "hundreds (if not thousands)" of documents MTO expected. (Compl.
2 at ¶ 2 & Ex. E.) The letter accompanying the released document
3 explained that the request was partially denied and that MTO had a
4 right to appeal the denial. (Compl., Ex. E.) MTO filed an
5 administrative appeal with USACE's counsel March 4, 2013. (Compl.,
6 Ex. G.) Although MTO sent the appeal to the address indicated in
7 USACE's letter, there appears to have arisen thereafter some
8 administrative confusion as to the location of MTO's appeal packet
9 and who, exactly, was responsible for hearing and responding to the
10 appeal. (Compl., Exs. H-N.) As of May 24, 2013, the person
11 responsible for reviewing the appeal had apparently still not
12 received the proper documents. (Compl., Ex. N.) Because of this
13 series of miscommunications and delays, MTO alleges, "[t]he Army
14 did not respond to Plaintiff's appeal within twenty working days,
15 as required by law." (Compl. ¶ 50.)

16 MTO alleges that as of September 18, 2013, when it filed the
17 Complaint, it had received no further responsive documents. (Id.
18 at ¶ 61.) On November 19, 2013, another office of the Department
19 of the Army altogether, the Office of the Administrative Assistant
20 to the Secretary of the Army, sent MTO a letter stating that *it* was
21 the entity authorized to accept FOIA requests and apparently
22 restarting the process under a new case number. (Decl. Jason Axe,
23 Ex. 1.) On December 12, 2013, that office responded to the March
24 4, 2013 appeal, agreeing to "releas[e] the requested documents to
25 you with partial redactions," but notifying MTO that the Army was
26 withholding about 50 pages' worth of documents altogether. (Decl.
27 Jason Axe, Ex. 2.) On April 21, 2014, the Army sent MTO a
28 "modified release of documents" undoing some of the redaction on

1 one page in the December 12 release and releasing an additional 13
2 pages. (Decl. Jason Axe, Ex. 4.) It appears, therefore, that at
3 this time 379 pages, comprising 26 documents, have been released in
4 redacted form to MTO. (Def.'s Vaughn Index, Decl. Jose Burgos.)
5 Six additional documents, identified as "Excel Spreadsheets," were
6 withheld altogether. (Id.) The Army has indicated that these
7 redactions and withholdings were done by Clark's counsel. (Id.)
8 MTO does not concede that these 32 documents are the only relevant
9 documents. (Pl.'s Statement Genuine Disputes Material Fact at
10 4:10-13.)

11 MTO seeks release of any withheld records, the release of all
12 documents "without improper redactions," a declaratory judgment
13 that "it was unlawful for the Army to fail to disclose the subject
14 records," and attorneys' fees. (Compl. at section titled "RELIEF
15 REQUESTED.")

16 The parties have filed cross-motions for summary judgment.
17 (Dkt. Nos. 27, 31.) On October 9, 2014, the Court ordered the Army
18 to produce the documents in question for in camera review, as well
19 as to supplement its Vaughn Index with clearer descriptions of the
20 items withheld in their entirety. (Dkt. No. 43.) The Court also
21 requested supplemental briefing from both parties on legal
22 precedent regarding FOIA exemption of the specific kinds of
23 information at issue, and also on the factual question of whether
24 Clark was likely to suffer competitive injury if the information
25 was revealed. (Id.) Both parties submitted supplemental briefs on
26 October 27. (Dkt. Nos. 46-48.)

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1 **II. LEGAL STANDARD**

2 A party may move for summary judgment with regard to any claim
3 or defense or any part of any claim or defense. Fed.R.Civ.P.
4 56(a). The court must grant summary judgment if "the movant shows
5 that there is no genuine dispute as to any material fact and the
6 movant is entitled to judgment as a matter of law." Id.

7 "Because there will rarely be any genuine issues of material
8 fact [in FOIA cases]-the document says whatever it says-the case
9 may usually be decided on summary judgment." Assembly of State of
10 Cal. v. U.S. Dep't of Commerce, 968 F.2d 916, 919 (9th Cir. 1992).
11 In many cases, the court simply "examine[s] the requested document
12 . . . to determine whether it falls within any of FOIA's statutory
13 exemptions from disclosure." Id.

14 However, where a defendant agency relies on the statutory
15 exemption from disclosure for trade secret or other confidential
16 commercial information obtained from third party persons, 5 U.S.C.
17 § 522(b)(4), there may be factual questions despite clear
18 identification of the documents in question. This is because
19 whether information is "confidential" for purposes of the exemption
20 turns on whether its disclosure is likely to either "impair the
21 Government's ability to obtain necessary information in the future"
22 or "cause substantial harm to the competitive position of the
23 person from whom the information was obtained." GC Micro Corp. v.
24 Def. Logistics Agency, 33 F.3d 1109, 1112 (9th Cir. 1994).
25 Particularly with regard to the "competitive position" of the third
26 party, more factual development may be needed to determine the
27 state of the marketplace and whether the material to be disclosed
28 would affect the third party's position. See Nat'l Parks &

1 Conservation Ass'n v. Morton, 498 F.2d 765, 770-71 (D.C. Cir. 1974)
2 (remanding for further factual development where it was not clear
3 whether affected third party's competitive position would be
4 injured).

5 "In evaluating a claim for exemption, a district court must
6 accord substantial weight to agency affidavits, *provided the*
7 *justifications for nondisclosure are not controverted by contrary*
8 *evidence in the record or by evidence of agency bad faith.*" Milner
9 v. U.S. Dep't of the Navy, 575 F.3d 959, 963 (9th Cir. 2009) rev'd
10 as to other matters sub nom. Milner v. Dep't of Navy, 131 S. Ct.
11 1259 (U.S. 2011) (emphasis added).

12 **III. DISCUSSION**

13 **A. Delay in Violation of FOIA's Requirements**

14 Plaintiff argues that the Army's delay in producing the
15 documents, caused in large part by a failure to promptly identify
16 the entity to which FOIA requests should be addressed, is itself a
17 FOIA violation. FOIA requires agencies to respond to document
18 requests within 20 days of receipt. 5 U.S.C. § 552(a)(6)(A)(I).
19 The Army took substantially longer than that to respond fully to
20 Plaintiff's request and subsequent appeal. Plaintiff therefore
21 seeks a declaratory judgment that the Army has violated FOIA's
22 timeliness requirements, independent of how the Court resolves the
23 question of whether the remaining undisclosed documents are exempt
24 from disclosure. (Compl., "RELIEF REQUESTED" ¶ 3.)

25 This Court has the authority to issue declaratory judgment
26 "[i]n a case of actual controversy within its jurisdiction," in
27 order to clarify "the rights and other legal relations of any
28 interested party seeking such declaration, whether or not further

1 relief is or could be sought." 28 U.S.C. § 2201. Plaintiff seeks
2 attorney's fees pursuant to 5 U.S.C. § 522(a)(4)(E), which allows a
3 FOIA requestor to seek "reasonable attorney fees and other
4 litigation costs reasonably incurred in any case under this section
5 in which the complainant has substantially prevailed." (Compl.,
6 "RELIEF REQUESTED" ¶ 4.) Because, as is discussed below in Part
7 III.B., the Court ultimately holds that the Army's redactions were
8 for the most part permissible under the commercial information
9 exemption, it is not immediately clear whether Plaintiff would be
10 entitled to attorney's fees on the basis of that claim alone.
11 Thus, a declaratory judgment that the Army unreasonably delayed
12 responding to Plaintiff's FOIA request could change the "rights and
13 other legal relations" between the parties.¹

14 Some district courts cite to Papa v. United States for the
15 proposition that "the production of all nonexempt material,
16 'however belatedly,' moots FOIA claims." 281 F.3d 1004, 1013 (9th
17 Cir. 2002) (quoting Perry v. Block, 684 F.2d 121, 125
18 (D.C.Cir.1982)). But the Papa quote is dictum in a case where
19 timeliness under FOIA was not at issue, and Perry, though more on
20 point, is a 1982 district court case from another circuit, and thus
21 of at most persuasive value.

22 It seems fair to say that in the Ninth Circuit, courts
23 sometimes enforce FOIA's timeliness requirements independent of the
24 underlying disclosure issues, at least when the violation is
25 "egregious" or when there is a "pattern or practice" of delay. See

26
27 ¹Although the request for attorney's fees was not addressed by
28 either party in these motions, it does provide a basis for the
Court to find that this declaratory judgment could change the legal
relationship between the parties.

1 Gilmore v. U.S. Dep't of Energy, 33 F. Supp. 2d 1184, 1188 (N.D.
2 Cal. 1998) (finding that a five month delay "constituted an
3 improper withholding of those documents in violation of the FOIA"
4 in the context of larger allegations of pattern and practice of
5 delay); Oregon Natural Desert Ass'n v. Gutierrez, 409 F. Supp. 2d
6 1237, 1248 (D. Or. 2006) (holding that an eight month delay was "a
7 violation of FOIA, regardless of the final outcome of the
8 request"); S. Yuba River Citizens League v. Nat'l Marine Fisheries
9 Serv., No. CIVS-06-2845 LKK/JFM, 2008 WL 2523819, at *6 (E.D. Cal.
10 June 20, 2008) (holding a six-month delay "violative of FOIA");
11 Hajro v. U.S. Citizenship & Immigration Servs., 832 F. Supp. 2d
12 1095, 1107 (N.D. Cal. 2011) ("It is undisputed that a plaintiff may
13 bring a claim alleging a pattern and practice of unreasonable delay
14 in responding to FOIA requests.") (internal quotation marks
15 omitted). Cf. Cmty. Ass'n for Restoration of the Env't, Inc. v.
16 EPA, No. 13-CV-3067-TOR, 2014 WL 3870168, at *9 (E.D. Wash. Aug. 6,
17 2014) (holding no cause of action where the delay was "not as
18 egregiously late as the response" in Gutierrez); but see id. at 9-
19 10 (noting that "procedural violations may warrant a remedy under
20 the FOIA if there is a pattern and practice of such violations,"
21 applying Gilmore, and examining the merits of the plaintiff's
22 pattern and practice claim). See also Long v. IRS, 693 F.2d 907,
23 910 (9th Cir. 1982) ("[U]nreasonable delays in disclosing
24 non-exempt documents violate the intent and purpose of the FOIA,
25 and the courts have a duty to prevent these abuses."); Fiduccia v.
26 U.S. Dep't of Justice, 185 F.3d 1035, 1041 (9th Cir. 1999)
27 ("[P]eople who file Freedom of Information Act requests in 1986,
28

1 revised and clarified in 1993, cannot be made to wait until
2 2001.").

3 Here Plaintiff has not alleged facts showing that the Army
4 engages in a pattern or practice of delay. Nor was the Army
5 egregiously deficient in responding to initial request for records.
6 Eleven days after Plaintiff's initial request, the Assistant
7 Secretary's office directed Plaintiff to USACE Norfolk, and
8 Plaintiff was able to lodge a request with USACE approximately
9 three weeks after its initial request.

10 At that point, however, the wheels began to come off the
11 wagon. In a letter dated October 17, 2013, USACE explained that
12 because the record came from a "non-government source" it would
13 need additional time to consult with Clark about the release, but
14 stated that Clark's arguments were expected by November 1, and that
15 USACE would make its release determination "[s]hortly thereafter."
16 (Compl., Ex. D) Under FOIA, an agency may notify a requestor that
17 it will take an additional ten days to make a determination of
18 whether it will release the requested documents if "unusual
19 circumstances" justify the delay. 5 U.S.C. § 552(a)(6)(B). The
20 need to communicate with a non-government entity does not appear to
21 fall within the definition of "unusual circumstances." 5 U.S.C. §
22 552(a)(6)(B)(iii) ("unusual circumstances" defined as need to
23 retrieve records from offsite facility; need to compile voluminous
24 records; or need to consult with "another agency"). Nor does
25 Defendant cite any authority to suggest that it does. Even if the
26 Court were willing to consider consultation with Clark as falling
27 within the "unusual circumstances" exception, however, the Army
28 took substantially longer than ten additional days to make its

1 initial determination of what records to release: the first release
2 of a single, redacted document did not occur for three months.

3 Even assuming for the sake of argument that a three month
4 delay at that point was not "unreasonable" or "egregious," the Army
5 further compounded the delay after Plaintiff timely filed an appeal
6 of the decision. An agency has 20 days to respond to an appeal of
7 a FOIA decision. 5 U.S.C. § 552(a)(6)(A)(ii). Here, the Army held
8 onto Plaintiff's appeal for another 11 months before responding. A
9 total unjustified delay of over a year is "egregious." "Congress
10 gave agencies 20 days, not years, to decide whether to comply with
11 requests" Fiduccia, 185 F.3d at 1041 (9th Cir. 1999)
12 (emphasis in original).

13 That the delay of Plaintiff's appeal appears to have been the
14 result of bureaucratic mishandling rather than intentional
15 obfuscation weighs some in the balance, but not enough to make the
16 delay reasonable. Agencies are under an obligation to establish
17 clear channels for FOIA requests, 5 U.S.C. § 552(a)(1)(A); implicit
18 in that obligation is that the agency and its employees will not
19 mislead requestors as to the proper method for making a request.
20 The Court will assume at this point that the Office of the
21 Administrative Assistant to the Secretary of the Army is, in fact,
22 the correct entity to respond to this FOIA request, and that no
23 other Army entity will emerge several weeks from now to take
24 control of the case. But if that is so, then the Office of the
25 Assistant Secretary of the Army, Installations & Environment, was
26 under an obligation to point Plaintiff to that office in the first
27 place, or at the very least not to misdirect Plaintiff to USACE.
28 And USACE was similarly under an obligation not to hold itself out

1 to Plaintiff, for the better part of a year, as the correct entity.

2 In Fiduccia, the Ninth Circuit refused to excuse the
3 government's excessive delay even where "practical difficulties"
4 existed due to budget cutbacks beyond the agency's control.
5 Fiduccia, 185 F.3d at 1041. This Court will not excuse the Army's
6 excessive delay simply because it has not created efficient
7 mechanisms for referring FOIA requests to the appropriate
8 entity-especially when it has affirmatively misinformed Plaintiff
9 as to where the request should be directed.

10 The Court finds that the Army's unreasonable delay violated
11 FOIA's timeliness requirements.

12 **B. The Withheld Materials and the Exemption for Confidential**
13 **Commercial Information**

14 The Army has redacted or withheld in their entirety certain
15 materials responsive to Plaintiff's request, pursuant to the
16 exemption from disclosure for confidential commercial material. 5
17 U.S.C. § 552(b)(4). Specifically, the Army has withheld technical
18 drawings, scheduling plans, and financial information contained in
19 the modified scope plans, as well as certain spreadsheets of
20 financial information known as "Pro Formas" associated with each
21 project. Plaintiff alleges that the withholding was improper.

22 The exemption under § 552(b)(4) does not cover all information
23 that a contractor shares with the government; only information
24 which is "privileged or confidential" is exempt. Id. Privilege is
25 not at issue here. Information is "confidential" if its disclosure
26 is likely to either "impair the Government's ability to obtain
27 necessary information in the future" or "cause substantial harm to
28 the competitive position of the person from whom the information

1 was obtained." GC Micro Corp. v. Def. Logistics Agency, 33 F.3d
 2 1109, 1112 (9th Cir. 1994). Defendant primarily² argues that
 3 releasing the redacted/withheld materials will harm Clark's
 4 competitive position, because other companies will be able to use
 5 the information to reconstruct information about Clark's practices.
 6 To prevail on the competitive position prong, Defendant must show
 7 "(1) actual competition in the relevant market, and (2) a
 8 likelihood of substantial competitive injury if the information
 9 were released." Lion Raisins v. U.S. Dep't of Agric., 354 F.3d
 10 1072, 1079 (9th Cir. 2004). The defendant agency has the burden of
 11 showing that a withheld document falls within the exemption: "[T]he
 12 burden is on the agency to sustain its action." 5 U.S.C. §
 13 552(b)(4)(B).

14 **1. Technical Drawings**

15 As an initial matter, Plaintiff does not dispute the
 16 redactions of technical drawings, (Opp'n & Mot. Summ. J. at 2 n.1),
 17 and neither party argues the point in subsequent briefings. The
 18 Court therefore finds that there is no genuine dispute of material
 19 fact as to the confidentiality of the technical drawings. Summary
 20 judgment is granted to Defendant as to the redacted drawings.

21
 22 ²Initially, Defendant also argued that disclosure would harm
 23 the Army's ability to obtain this sort of information in the
 24 future. (Dkt. No. 27 at 10:18-23.) However, this was supported by
 25 a single, conclusory statement in the declaration of Jose Burgos,
 26 (Dkt. No. 28-1, ¶ 15), and appears to have been abandoned in the
 27 Reply. (Dkt. No. 36.) In any event, courts have often been
 28 reluctant to give this argument much credence when it comes to
 large government contractors: "It is highly unlikely that NAVAIR's
 ability to obtain such information in the future would be impaired
 in the least if it releases the contracts, and Martin Marietta does
 not argue that it will. Government contractors, including Martin
 Marietta, will continue bidding for NAVAIR contracts despite the
 risk of revealing business secrets if the price is right." Martin
Marietta Corp. v. Dalton, 974 F. Supp. 37, 40 (D.D.C. 1997).

1 **2. Actual Competition in a Relevant Market**

2 Plaintiff argues that Clark no longer faces competition in a
3 relevant market, because the bidding for domestic military housing
4 projects is closed. (Pl.'s Suppl. Briefing at 7.) Defendant,
5 however, notes that the Navy, at least, may continue to take bids
6 for follow-on work on some projects. (Def.'s Suppl. Briefing at
7 6.) Defendant also identifies several additional markets in which
8 Clark does or may face actual competition: (1) the market for bids
9 to take over domestic projects where the initial bidder has failed;
10 (2) the market for bids on overseas military housing; (3) the
11 market for similar kinds of construction projects, such as
12 university or low-income housing; and (4) as manager of the housing
13 properties, the market for servicemember tenants, who may choose to
14 rent on the private market instead. (Def.'s Suppl. Briefing at 6-
15 7, 12.)

16 In each of these markets, Clark bids or plans to bid for jobs,
17 or competes for tenants, and other companies or entities do
18 likewise. All these markets are in the housing field, and so
19 information about Clark's business model in housing construction
20 and management is relevant to these markets. The Court therefore
21 finds that Clark now faces or will face actual competition in a
22 relevant market.

23 **3. Likelihood of Substantial Competitive Injury**

24 Plaintiff's primary arguments as to the likelihood of
25 competitive injury are twofold. First, Plaintiff argues that
26 military housing projects are sui generis: the scheduling, phasing,
27 budgeting, and costs of such projects have at least as much to do
28 with the unique budgetary and personnel management needs of the

1 military as it does with Clark's ability to engage in construction
2 on a particular timeline. (Pl.'s Suppl. Briefing at 9; Decl. Scott
3 Orantia, Dkt. No. 31-2, ¶¶ 20-22.) And second, the redacted and
4 withheld information is too dated to be of value to Clark's
5 competitors. (Pl.'s Suppl. Briefing at 9-11.)

6 There is some merit to these arguments. Certainly the facts
7 and figures themselves may have little bearing on future
8 competitive bidding or other activities in the housing markets
9 identified above. The bidding processes used may be different; the
10 input costs are likely to vary depending on market conditions;
11 interest rates fluctuate; scheduling and phasing are likely to vary
12 according to the needs of the client; and so on. Such discrete
13 factual data, seen in isolation, might tell a potential competitor
14 little about Clark's future bids or other business activity.

15 But Defendant explained at oral argument, and the Court
16 agrees, that it is not the data alone that must be considered, but
17 the overall picture they give of Clark's internal deliberative
18 process-how it structures its fees, how it categorizes its costs,
19 how it responds to changes in the availability of financing, how it
20 makes projections about future market conditions, how it structures
21 payments to subcontractors, etc.

22 FOIA is designed to provide citizen oversight of government
23 agencies, not to provide competing private contractors a window
24 into each other's internal business practices. Thus, the cases
25 confirm that large-scale financial information, such as overall
26 contract pricing, is usually available for disclosure because it

1 lets the public know how agencies are spending taxpayer money.³
 2 But more specific financial information is often protected from
 3 disclosure, because revealing it would give competitors an unfair
 4 peek into the company's operations.⁴ The D.C. Circuit has
 5 explained:

6 [T]he total contract price paid by the Government is routinely
 7 made public, because that disclosure informs citizens about
 8 "what their government is up to." The pricing information
 9 Lockheed seeks, however, has little to do with the core
 10 purpose of the FOIA, namely, *contributing significantly to*
 11

12 ³GC Micro Corp. v. Def. Logistics Agency, 33 F.3d 1109, 1115
 13 (9th Cir. 1994) ("[D]ata on the percentage and dollar amount of
 14 work subcontracted out to SDB's on each defense contract tells
 15 competitors nothing of, inter alia, the object of the contract or
 16 subcontracts, the unit prices charged by the subcontractors, and
 17 the profit or productivity rates of either the contractor or
 18 subcontractors."); McDonnell Douglas Corp. v. Nat'l Aeronautics &
 Space Admin., 180 F.3d 303, 306 (D.C. Cir. 1999) ("It is undisputed
 that the total price of the contract may be made public.");
Racal-Milgo Gov't Sys., Inc. v. Small Bus. Admin., 559 F. Supp. 4,
 6 (D.D.C. 1981) ("Disclosure of prices charged the Government is a
 cost of doing business with the Government.").

19 ⁴Lion Raisins v. U.S. Dep't of Agric., 354 F.3d 1072, 1081
 20 (9th Cir. 2004) ("[P]roducing the Line Check Sheets of Lion's
 21 competitors would reveal the type of raisins Lion's competitors
 22 produced at the time of the inspection Moreover, revealing
 23 the 'sampling time' information from the Line Check Sheets would
 24 allow Lion to infer the volume of its competitors' raisin sales . .
 25 . . Finally, the 'remarks' column of the Line Check Sheets
 26 typically includes information . . . from which the identity of the
 27 packer being inspected could be inferred."); Gulf & W. Indus., Inc.
 v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979) ("The deleted
 portions of the report included, among other things, 'actual costs
 for units produced,' 'actual scrap rates,' 'break-even point
 calculations' and 'actual cost data.'"); McDonnell Douglas Corp. v.
 U.S. Dep't of the Air Force, 375 F.3d 1182, 1192 (D.C. Cir. 2004)
 ("We recoil . . . from the implication of . . . a per se rule (or
 at least a strong presumption) that all constituent pricing
 information-as opposed to the bid price itself-is to be disclosed;
 such a rule would be squarely at odds with the protection we have
 always understood Exemption 4 to provide for such pricing
 information.").

1 *public understanding of the operations or activities of the*
2 *government. On the contrary, the information now in suit*
3 *reveals the internal workings of the contractor, not those of*
4 *the Government, and would seem to shed little if any light*
5 *upon the agency's performance of its statutory duties*
6 [W]hether the lower bidder marked up one cost element by a
7 large margin and another by a small margin, in the course of
8 making its bid competitive overall, is not self-evidently
9 relevant to the question what the "government is up to."

10 McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 375 F.3d
11 1182, 1193 (D.C. Cir. 2004) (emphases added).

12 Having reviewed the unredacted files in camera, the Court
13 finds that, in the main, what has been redacted is the kind of
14 information that would unfairly let competitors look into Clark's
15 internal decision-making process. The redacted information mostly
16 consists of information showing how Clark organizes and phases the
17 construction of new housing, how it reacts to unanticipated market
18 conditions, how it approaches financing, and how it breaks down
19 costs and spending to get the job done. The Court does not agree
20 with all of Defendant's redactions and will issue a separate order
21 requiring the release of some small amounts of additional
22 information that do not seem to fall under the exemption for
23 confidential commercial information. Some sentences describing
24 overall shifts in costs and income streams, general market
25 conditions, or changes in government policies, for example, are not
26 confidential commercial information and will be released.

27 But for the most part, the Army's redactions are reasonably
28 targeted to protect Clark's internal processes while still

1 providing a great deal of general information about the Projects,
2 the ways in which they were modified based on new information, and
3 how those modifications might affect the availability and quality
4 of military housing. The Army has struck a reasonable balance
5 between providing information of public interest and protecting
6 Clark's internal processes, and most of the information was
7 correctly redacted.

8 **IV. CONCLUSION**

9 The parties cross-motions for summary judgment are each
10 GRANTED IN PART AND DENIED IN PART. Summary judgment is GRANTED to
11 Plaintiff on the issue of delay; the Court finds that Defendant's
12 delays in processing Plaintiff's request and appeal constituted an
13 independent FOIA violation. Summary judgment is GRANTED IN PART to
14 Defendant on the issue of the exempted material. The Court will
15 return the unredacted copies of the documents to Defendant with a
16 separate order explaining what additional information is not
17 exempt; the Court orders Defendant to release such information to
18 Plaintiff.

19
20 IT IS SO ORDERED.

21
22 Dated: November 6, 2014


DEAN D. PREGERSON
United States District Judge